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No. ~~556~~ 24

In the Supreme Court of the United States

OCTOBER TERM, 1929

NOAH CROOKS, COLLECTOR OF INTERNAL REVENUE,
PETITIONER

v.

BENJAMIN HARRELSON ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General, on behalf of the Collector of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Eighth Circuit entered in the above entitled case on October 3, 1929, affirming the judgment of the District Court of the United States for the Western District of Missouri.

STATEMENT

William H. Harrelson, of Kansas City, Missouri, died testate on March 8, 1920 (R. 2), the owner of certain real property situate in that State (R. 3).

Respondents were the sole distributees and devisees of his estate. (R. 2.) In making the return for Federal estate tax purposes, the executors of William H. Harrelson included the value of the real property in his gross estate. Thereafter they filed a claim for refund alleging that under the laws of the State of Missouri real property owned by decedent at the time of his death was not subject to the payment of the expenses of the administration of his estate, and therefore that the value of the real property was not lawfully included in decedent's gross estate. The Commissioner rejected the claim and respondents brought this action to recover that portion of the Federal estate tax which was imposed by reason of the inclusion of the value of the real property in decedent's gross estate. (R. 3.)

The petition demanded judgment for the sum of $37,762.20 with interest at the rate of six per centum per annum from July 24, 1922. (R. 4–5.) The Collector demurred to the petition. (R. 7.) The District Court overruled the demurrer on December 14, 1928, and granted judgment in the amount prayed for to these respondents. (R. 7.) The Collector thereupon appealed to the Circuit Court of Appeals for the Eighth Circuit. (R. 9.) That court affirmed the judgment of the District Court. (R. 21.)

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred:

In holding that the value of the real estate of a decedent in the State of Missouri should not be included in the measure of decedent's gross estate for the purpose of computing the Federal estate tax under the provisions of Section 402 of the Revenue Act of 1918.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals is in conflict with the decision of the Court of Claims in the case of *Steedman* v. *United States,* 63 C. Cls. 226, certiorari denied, 275 U. S. 528. It is also contrary to the decision of the United States Board of Tax Appeals in *Bartlett et al., Executors,* v. *Commissioner,* 16 B. T. A. 811. The effect of the decision is to produce inequality as between taxpayers in the incidence of the Federal Estate Tax, based upon local rules of property, which it is believed was not the intention of Congress. This case is one of a considerable number now pending in District Courts of the United States in Missouri, which involve large amounts. The question arises under the Revenue Acts of 1916, 1918, 1921, and 1924, and the Treasury Department is in need of an authoritative rule for its guidance in the administration of those Acts.

Wherefore, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Circuit Court of Appeals for the Eighth Circuit should be granted.

CHARLES E. HUGHES, JR.,
Solicitor General.

JANUARY, 1930.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Missouri (R. 10–12) is reported in 28 F. (2d) 510. The opinion of the United States Circuit Court of Appeals (R. 14) is not yet reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals was entered October 3, 1929. (R. 21.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

May the value of real property situate in the State of Missouri be included in the measure of the gross estate of a decedent who died the owner thereof under the provisions of Section 402 of the Revenue Act of 1918?

STATUTE AND REGULATION INVOLVED

The Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097:

> SEC. 402. That the value of the gross estate of the decedent shall be determined

by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his estate;

(b) To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, courtesy, or by virtue of a statute creating an estate in lieu of dower or courtesy;

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, or with respect to which he has at any time created a trust, in contemplation of or intended to take effect in possession or enjoyment at or after his death (whether such transfer or trust is made or created before or after the passage of this Act), except in case of a bona fide sale for a fair consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such a consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title;

(d) To the extent of the interest therein held jointly or as tenants in the entirety by the decedent and any other person, or deposited in banks or other institutions in their

joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have belonged to the decedent;

(e) To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of, or intended to take effect in possession or enjoyment at or after, his death, except in case of a bona fide sale for a fair consideration in money or money's worth; and

(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

Treasury Regulations 37, Article 12, relating to Section 402 (a):

Character of interest included.—This provision is designed to include all property interests of the decedent, of whatever character. It is the commonest form of taxable transfer. As a basis for tax, there must be an actual, beneficial ownership in the decedent, not a bare legal title, or one held in trust. Thus, property actually devoted to religious or charitable purposes, and placed in the name of an individual solely for convenience in administration, is not included in his gross estate. The

statute also includes only property rights existing in the decedent in his lifetime and passing to his estate. It consequently does not include a right which came into existence only after the decedent's death, such as a cause of action by statute for causing the death. The proceeds of such a cause of action should not be included in the gross estate, whether payable generally to the estate or to some specified class of persons, such as the widow or children.

The value of a vested remainder should be included in the gross estate. Nothing should be included, however, on account of a contingent remainder where the contingency does not happen in the lifetime of the decedent, and the interest consequently lapses at his death. Nor should anything be included on account of a life estate in the decedent. There should be included, however, the value of an annuity payable to the decedent upon the life of a third person who survives him, and the value of an estate for the life of a person other than the decedent. For rules as to valuing such annuities and illustrations, see Article 20.

STATEMENT

A statement of the case and the error relied upon will be found in the petition.

ARGUMENT

The Circuit Court of Appeals held that in drawing the provisions of Section 402 of the Revenue Act of 1918 it was the intention of Congress that real property should be included in the measure

of a decedent's gross estate for estate-tax purposes only in case all the conditions expressed in subdivision (a) thereof were satisfied. It held that real property in the State of Missouri was not subject to the payment of administration expenses, and hence that such property could not be included in the gross estate.

It must be recognized that the court's construction of Section 402 (a) finds support in the language of this Court, albeit unnecessary to the decision, in *United States* v. *Field,* 255 U. S. 257, 262, in which, in holding that property passing under a testamentary execution of a power of appointment could not be included in the gross estate under Section 202 of the Revenue Act of 1916, which did not, as does the Revenue Act of 1918, include any subdivision applying specifically to that situation, it said:

> The conditions expressed in clause (a) are to the effect that the taxable estate must be (1) an interest of the decedent at the time of his death, (2) which after his death is subject to the payment of the charges against his estate and the expenses of its administration, and (3) is subject to distribution as part of his estate. These conditions are expressed conjunctively; and it would be inadmissible, in construing a taxing act, to read them as if prescribed disjunctively. Hence, unless the appointed interest fulfilled all three conditions, it was not taxable under this clause.

Following the decision in the *Field case,* this construction was adopted by the Treasury Department (see Regulations 63, Article 11, approved by the Secretary of the Treasury July 27, 1922) under the Revenue Act of 1921, Section 402 of which was identical with the corresponding section of the 1918 Act.

On the other hand, reading Title IV of the Revenue Act of 1918, imposing the estate tax, as a whole, it is difficult to believe that Congress intended that, in a statute designed to be of general and uniform application, the inclusion in the gross estate of real property owned by a decedent at his death should depend on whether under the laws of a particular State it was or was not subject to the payment of administration expenses. The opening language of Section 402 clearly indicates that Congress intended to include in the gross estate all the decedent's property, and an intention to exclude therefrom any real property absolutely owned by him at the time of his death should not be implied from ambiguous language.

This was the view taken by the Court of Claims in *Steedman* v. *United States,* 63 C. Cls. 226, which reached a result as to the inclusion of Missouri real estate in the gross estate exactly opposite to that of the court below in the instant case. The Court of Claims said (pp. 233–234):

> The plain purpose of Congress as disclosed by the first part of section 402 was to sub-

ject to taxation "all of the estate" of a decedent to the full extent of his interest therein at the time of his death, whether real or personal, tangible or intangible, and wherever situated.

What the qualification, "which is subject to," was expected to exclude it is difficult to see. It is not reasonable to hold that Congress intended or had in mind the possibility of the exclusion from taxation of all real estate of a decedent where a statute of the State in which it was located did not specifically grant the right to sell it for the payment of the expenses of administration, or where a court of such State had held that under the existing statute it could not be subjected to sale for such purpose; that is to say, it is unreasonable to hold that Congress intended to exempt from taxation the real estate of a decedent in any of the States where the statute of the State did not specifically authorize the sale of it for the payment of expenses of administration. If each of the States had no such statute, all real estate would be exempt, and if in one State there was such a statute, the real estate would be taxable, and in another, where there was none, it would not be taxable, thus creating an inequality in taxation and a discrimination in favor of the States that have not passed such a statute.

The case of *United States* v. *Field, supra,* under the facts, we do not think controlling here.

It is presumed that Congress knew that under the common law real estate could not

be sold by a probate court for the payment of debts or administration expenses. To hold that it intended to exclude from taxation all real estate or interest therein which was not subject to the payment of charges against the estate or expenses of administration and subject to distribution, unless specially allowed and jurisdiction given to the courts by State statutes, would be to hold that Congress included all real estate as subject to taxation and then provided for the possibility of all of it being excluded and exempted.

It is an established rule of construction that an act must be read as a whole with a view to ascertaining the real purpose of Congress, with the assumption of a reasonable and intelligent purpose on its part, and that no construction should be given to an act or a limitation thereof which would do violence to the general purpose of the act and render it futile or absurd. It is the duty of the court to so construe an act as to accomplish its general purpose and to enforce it in conformity with that purpose and within the reason of the act.

The construction of Section 402 by the Circuit Court of Appeals in the instant case would, we submit, lead to absurdities. The court holds that real estate of which the decedent died seized is not to be included in his gross estate unless it is by the law of the State "subject to the payment of the charges against his estate and the expenses

of its administration, and is subject to distribution as part of his estate." No such conditions are expressed in any of the other subdivisions of the section, though they clearly relate to real as well as personal property. Under subdivision (c), if a decedent has prior to death transferred Missouri real property in contemplation of death, it is to be included as part of his gross estate, although, according to the construction of the court below, the same real property would not have been so included if he had owned it at his death. Under subdivision (d) if Missouri real property is owned by a decedent in joint tenancy it is included in the gross estate, although, under the opinion of the court below, it would not be included if he had owned it outright. Under subdivision (b) the dower or courtesy interest of the surviving spouse would be included in the gross estate of the decedent, although the decedent's own interest would not be if the decision below is correct.

A construction of the statute which leads to such results should be avoided, if that be possible without doing violence to its language. It is submitted that the language is not so clear and unambiguous as to require that construction. The qualification in subdivision (a) "which after his death is subject to the payment of the charges against his estate and the expenses of its administration and is subject to distribution as part of his

estate" can not be literally applied to real property without attributing to Congress an inartificial use of language. The third condition prescribed by Section 402(a) is that the interest to be included must be "subject to distribution as part of his [decedent's] estate." It is axiomatic that only personal property is "subject to distribution." *Leakey* v. *Maupin,* 10 Mo. 368, 373; 2 Schouler on Wills (5th Ed.), Section 1495, p. 1583; Bouvier's Law Dictionary (1928 Ed), pp. 294–295; *Thomson* v. *Tracy,* 60 N. Y. 174, 181; *Beard* v. *Lofton,* 102 Ind. 408. Moreover, Congress must be presumed to have known that under the common law real property was not liable either for the payment of debts or for administration expenses. It is not reasonable to suppose that Congress in enacting a law of general application throughout the United States intended to discriminate in favor of taxpayers owning real property in States which retained the common law rule and against those whose real estate interests were in States which had modified it.

The Congressional Reports on the corresponding section of the Revenue Act of 1916 (House Report No. 922, 64th Congress, 1st Session, p. 5) throw little light on the question. In drawing the instant Act, however, Congress added 402 (b), providing that the value of the gross estate should include "any interest therein of the surviving spouse, existing at the time of the decedent's death as dower,

curtesy," etc. The report of the Committee on Finance, Senate No. 617, 65th Congress, 3rd Session, p. 41, very significantly explains this as follows:

> Section 402 of this bill, which takes the place of section 202 of the original act, has been revised so as to contain a provision specifically including in the gross estate dower, curtesy, or any estate created in lieu of dower or curtesy. The distinction between dower and curtesy interest and property passing to wife or husband by will or intestate succession is technical rather than real, at least in the consideration of the question as to whether they should be subject to estate tax. The proposed amendment is for the purpose of making it clear that such interests are to be included.
>
> It was the intention of the framers of the original act that dower, curtesy, and estates created in lieu of dower or curtesy should be included in the gross estate, and your committee believes that the Treasury Department has correctly ruled in requiring them to be so included. Since a dispute has arisen with reference to this question, your committee deems it advisable to provide specifically that these estates shall be included in the gross estate.

As neither dower, curtesy, nor any estate created in lieu of dower or curtesy would have been included under the language of subdivision (a) of Section 202 of the Revenue Act of 1916 (which is

identical with that of the same subdivision of Section 402 of the 1918 Act) as construed by the court below, the statement of the Committee necessarily means that the court's construction of the section was not according to the intention of its framers.

The Court of Claims also places its decision upon the ground that under the law of Missouri real property is "subject to" the payment of administration expenses. The court said (63 C. Cls. p. 232):

> Section 402, *supra,* does not use the word "liable"; it uses the words "subject to." "Subject to" does not necessarily mean "liable for." It may be said that where land is liable for sale for the payment of debts, it is subject to the payment of debts, but the converse is not necessarily true. Real estate may be under certain conditions "subject to" the payment of expenses of administration and yet not liable to sale therefor; that is, it may be under the contingency of or exposed to payment of administrative expenses and thus "subject to" the payment.
>
> Real estate may be sold under the Missouri statute for the payment of debts, and, having been sold, because the personal estate was not sufficient to pay the debts and the administration expenses, the latter could be paid, under the decision of the court of Missouri, out of the fund realized from the sale. *Howell* v. *Jump,* 140 Mo. 441. If the proceeds from the sale of real estate for payment of debts may be used under certain con-

tingencies for the payment of administration expenses, it is in such a case "subject to" the payment of the expenses of administration.

Whether the Court of Claims was correct in its interpretation of the Missouri law is not material unless it was the intention of Congress that the law of the different States should control the question whether real property situated therein should be included in the gross estate.

We submit that such an intention should not be imputed to Congress. Subdivisions (b), (c), (d), (e), and (f) draw into the gross estate certain other property which the decedent at his death either did not own at all or of which he had only limited ownership. In either case, however, decedent's death served as the generating cause of transfer for the purpose of bringing the property within the measure of the taxable estate. These provisions are most comprehensive, and evidence sedulous care to include all property which could possibly be regarded as having undergone a taxable transfer by death. In view of this manifest general purpose, it is not reasonable to suppose that Congress intended by subdivision (a) to allow any property interest which was owned outright by the decedent to escape. (See Regulations 37, Article 12, *supra,* p. 7). If it was the intent to reach all the decedent's real property that intent is not to be thwarted by particular rules of property in the several States. *United States* v. *Robbins,* 269 U. S.

315, 327; *Burk-Waggoner Association* v. *Hopkins*, 269 U. S. 110.

CONCLUSION

It is submitted that the construction of the statute by the Court of Claims and the Board of Tax Appeals is preferable to that the Circuit Court of Appeals in the instant case. But whichever view is correct, we submit that the existing conflict of decisions makes this a proper case for review.

Respectfully,

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JANUARY, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930